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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

11 CR 114 (MGC)

5 XING LIN,

6 Defendant.

JURY TRIAL

7 -----x

8 New York, N.Y.

9 April 9, 2013

9:55 a.m.

10 Before:

11 HON. MIRIAM GOLDMAN CEDARBAUM,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 PETER M. SKINNER

JENNIFER E. BURNS

18 Assistant United States Attorneys

19 JOEL S. COHEN

Attorney for Defendant

20 ALSO PRESENT: BRENDA CHEN, Fuchow Interpreter

21 DANIEL YANG, Fuchow Interpreter

JESSICA CHACE, Paralegal

22 TIMOTHY VARIAN, Special Agent, HSI

23 JIAYING WANG, Legal Assistant

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(Trial resumed)

(In open court; jury not present)

THE COURT: While we are waiting for a jury panel, there are a few housekeeping matters that I would like to resolve.

The extortion in this case is in interstate commerce, or so it's charged. Is there any reason to talk about foreign commerce in explaining interstate commerce? Anything ought to be claimed was -- affected commerce between a state and a foreign government, a foreign country?

MR. SKINNER: Not with respect to the extortion in this case, your Honor, no.

THE COURT: Well, with respect to what?

MR. SKINNER: There will be testimony that the defendant, after the shootings in the karaoke bar, moved his gang to Toronto, Canada, and opened gambling parlors in Toronto.

THE COURT: Which charge is that in connection with?

MR. SKINNER: The racketeering charge, your Honor. It's evidence both of the racketeering enterprise that continued until December 2009, and it's evidence of the racketeering conspiracy which charges a conspiracy to operate gambling parlors and engage in an illegal enterprise.

THE COURT: You're charging operating gambling parlors in Canada?

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1 MR. SKINNER: No, your Honor. It's evidence that the
2 enterprise continued to operate, as charged, until December
3 2009.

4 THE COURT: I understand.

5 But was the enterprise supposed -- the enterprise,
6 when it was here, did not affect foreign commerce.

7 MR. SKINNER: Your Honor, the enterprise did
8 tangentially affect foreign commerce in that the extortion
9 payments continued until December of 2009. And the evidence at
10 trial will show that the defendant was situated in Canada
11 during that time period. The payments were made --

12 THE COURT: So you're saying that extortion payments
13 were sent to the defendant in Canada?

14 MR. SKINNER: Yes, your Honor. That would be the
15 inference we're arguing from the evidence.

16 THE COURT: You have evidence of that?

17 MR. SKINNER: Well, the payments were made on a
18 monthly basis in cash to the defendant's wife as per the
19 defendant's instructions that the payments should be made to
20 his wife for a period of time for years before that.

21 THE COURT: I see. But what is the evidence that she
22 was sending the money to him?

23 MR. SKINNER: It's an inference, your Honor. We don't
24 have direct evidence.

25 THE COURT: Maybe he wanted her to support herself

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1 with it.

2 MR. SKINNER: He may have. He may have also wanted
3 some of it sent up to Canada.

4 THE COURT: I understand. But you have no evidence
5 one way or the other.

6 MR. SKINNER: No direct evidence.

7 THE COURT: Well, it's not matter of direct or
8 circumstantial; that's not really circumstantial evidence that
9 he was receiving it in Canada.

10 MR. SKINNER: Well, your Honor, I believe that the
11 defendant, for a period of years, received the payments
12 directly. And then, after he put himself in a position where
13 he had to flee, put another person in place to collect
14 payments. We can certainly argue that there's circumstantial
15 evidence and an inference --

16 THE COURT: I don't think that's circumstantial
17 evidence.

18 MR. SKINNER: That's what we intend to argue.

19 THE COURT: Circumstantial evidence is not that loose.

20 MR. SKINNER: That would be the, as I said, tangential
21 effect on foreign commerce. And, in any event, as I
22 explained --

23 THE COURT: If it were, if it were, it's a question.
24 I'm not sure that I need to talk about foreign commerce. I'm
25 just interested in how I'm going to explain these charges.

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1 MR. SKINNER: Very well, your Honor.

2 THE COURT: I don't think foreign commerce is of great
3 significance in that.

4 MR. SKINNER: I'm not arguing with you. But I think
5 that there is possibly -- not possibly, there is, as I argued
6 in argument that there was, in fact --

7 THE COURT: I'm not sure I'm going to permit you to
8 call that circumstantial evidence. I'll have to hear the
9 evidence.

10 MR. SKINNER: You'll hear the evidence, your Honor.
11 And whether the jury --

12 THE COURT: All right. At least I know what you are
13 thinking.

14 MR. SKINNER: Thank you, your Honor.

15 MR. COHEN: Your Honor, respectfully, I would ask that
16 until we reach the point --

17 THE COURT: I don't intend to charge the jury in the
18 voir dire.

19 MR. COHEN: I understand.

20 I would just ask that the government not open on that
21 issue until we've reached a point in the trial where the Court
22 is in a better position to evaluate whether that evidence or
23 argument should even be made.

24 THE COURT: Well, I don't think the government's going
25 to elaborate heavily on interstate commerce in their opening.

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1 Am I wrong?

2 MR. SKINNER: You're absolutely correct, your Honor.

3 THE COURT: All right.

4 Now, you have several citations to the aiding and
5 abetting statute. But there is nothing -- there are no factual
6 statements in the indictment about aiding and abetting. They
7 are all substantive statements. I don't like to -- well, this
8 is just really -- we'll discuss this at the charge conference;
9 I'm just raising it because these both relate really to the
10 charge and not to the voir dire.

11 Now, you charge overt acts in Count Five, which is a
12 conspiracy to commit extortion. And as I understand, this,
13 again, is not a matter of great opening concern. As I
14 understand it, it is unnecessary to charge overt acts in a
15 conspiracy to commit extortion.

16 MR. SKINNER: That's correct, your Honor.

17 THE COURT: So this is what I would call surplusage.

18 MR. SKINNER: Your Honor, it was included in the
19 indictment to provide information for the defendant to
20 understand the nature of the crimes charged.

21 THE COURT: This is like a bill of particulars in the
22 indictment.

23 MR. SKINNER: To some extent, your Honor, yes.

24 THE COURT: All right.

25 MR. SKINNER: But I agree with you, the overt act

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1 requirement is not required, and we have no issue with taking
2 the overt acts out of the version of the indictment that is
3 sent to the jury.

4 THE COURT: Good. That's sent to the jury. That's
5 the important thing. I don't want to confuse the jury.

6 MR. SKINNER: We actually did not redact that out of
7 the redacted indictment that we sent over last week, but we'll
8 take care of that straightaway.

9 THE COURT: Right. As I said, these are matters I
10 will really address in greater depth at the charge conference.
11 But I also will not charge *Pinkerton*, which is an optional
12 charge, because *Pinkerton* -- the facts of the *Pinkerton* case
13 are so far afield from the facts of this case, that I don't
14 find it an appropriate source for the charge. I'm just giving
15 you reference for the information for the future.

16 I think in the voir dire I will ask the jury with
17 respect to places only, something like: You will hear during
18 the course of the trial reference to a karaoke bar on Kissena
19 Avenue in Queens, which is no longer there. Are any of you
20 familiar with that bar?

21 That's the one place question I'm going to ask.

22 MR. SKINNER: That's fine, your Honor. I just note
23 it's actually Kessina Boulevard, not Kessina Avenue.

24 THE COURT: Thank you. Yes. I have it written
25 properly, I just...

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1 All right. Now, is there anything else --

2 MS. BURNS: Your Honor, we did --

3 THE COURT: -- before the jury panel arrives?

4 MS. BURNS: We did revise the list of names just to
5 include some witnesses that had not been on our list back in --

6 THE COURT: You have added witnesses?

7 MS. BURNS: We have.

8 THE COURT: Well, I have not received it.

9 MS. BURNS: They are included on this list here. I
10 can give a copy up to your Honor.

11 THE COURT: Very well.

12 Now, who are all these many people?

13 MS. BURNS: These are the names we expect. They are
14 both witnesses and names that are going to come out in the
15 course of the testimony, your Honor. If your Honor wants a
16 separate listing of anticipated witnesses, I can provide that,
17 as well.

18 THE COURT: No, no, no. I don't need to tell the jury
19 who the witnesses are going to be.

20 MS. BURNS: Right. That was what I anticipate, your
21 Honor. So it is a lengthy list, but comprehensive.

22 THE COURT: Oh, this is a substitute, is that what
23 you're offering?

24 MS. BURNS: Yes.

25 THE COURT: For the list that I have already.

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1 MS. BURNS: Yes, your Honor.

2 THE COURT: All right. So I'll switch to this one.

3 MS. BURNS: Thank you.

4 MR. COHEN: Your Honor, I have two potential names to
5 add to the list of people that might either be witnesses or
6 about whom people will hear.

7 One is Mary Wang, and the other is Detective Keith Ng,
8 N-G.

9 THE COURT: Well, I will ask them if they recognize
10 those names or know any of those persons.

11 Just tell me again who they are.

12 MR. COHEN: Mary Wang, W-A-N-G, and retired detective
13 Keith Ng, Keith, K-E-I-T-H, N-G.

14 THE COURT: I'm slow. Mary Wang, W-A-N-G, or --

15 MR. COHEN: Yes.

16 THE COURT: And?

17 MR. COHEN: Detective -- Retired Detective Keith,
18 K-E-I-T-H, Ng, N-G.

19 THE COURT: All right. Thank you.

20 MR. COHEN: Two questions, your Honor.

21 THE COURT: Yes.

22 MR. COHEN: With respect to the seating of the
23 prospective jurors, are we going to have one through six in the
24 front row or one through seven in the front row?

25 THE COURT: We're going to fill all the seats.

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1 MR. COHEN: No, I understand.

2 THE COURT: We're going to have one through eight.
3 Did they remove a seat from this jury box?

4 MR. COHEN: I see seven in the front row.

5 THE COURT: I see a space in the jury box. We've
6 always had eight.

7 MR. COHEN: Okay.

8 THE COURT: What happened to the second seat? We
9 normally have 18 in the jury box, and the second row seems to
10 be crowded.

11 MR. COHEN: And my other question, your Honor, was --

12 THE COURT: I don't know who's -- we should --

13 THE DEPUTY CLERK: This is the way we have it, Judge.

14 THE COURT: Seven, 14, and four is 18, yes. All
15 right.

16 MR. COHEN: So it will be one through seven, and then
17 eight in the --

18 THE COURT: Correct.

19 MR. COHEN: -- further seating.

20 THE COURT: Correct.

21 MR. COHEN: Okay.

22 THE COURT: We'll go in sequence up to 18.

23 MR. COHEN: Gotcha. And, your Honor, may I just step
24 out to the rest room before the jurors come in?

25 THE COURT: Yes. I will question jurors who sit in

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1 the back, as well.

2 MR. COHEN: I understand that.

3 And if we have 18 here, I'm assuming that the juror to
4 the furthest left will be No. 19?

5 THE COURT: We will give that juror a number, but I
6 don't know whether I'm going to start at that end or this end.

7 MR. COHEN: Okay.

8 THE COURT: But, yes, we will number each of the
9 jurors in sequence.

10 MR. COHEN: Okay.

11 THE COURT: And you will hear the number.

12 MR. COHEN: And can I step out to the rest room,
13 Judge?

14 THE COURT: I'm sorry?

15 MR. COHEN: May I step out to the rest room?

16 THE COURT: Yes, of course.

17 Actually, we can take a five-minute recess, because
18 I've just been advised that there is some materials being read
19 to the prospective jurors, and they will be here in about,
20 what, ten minutes? So we can take a ten-minute recess.

21 MR. SKINNER: Thank you, your Honor.

22 (Recess)

23 THE COURT: Please be seated. I understand the jury
24 panel is on their way.

25 (Pause)

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1 THE COURT: There seems to be some confusion in the
2 jury room, I'm sorry to say. I'm going to take a brief recess.

3 I'll be back.

4 (Recess)

5 (A jury of 12 and 5 alternates was impanelled and
6 sworn)

7 THE DEPUTY CLERK: Thank you.

8 THE COURT: I'd just like to give you a few
9 preliminary instructions before you follow Mr. Daniels into the
10 jury room, which will be your home away from home during the
11 course of this trial.

12 When you arrive in the morning, you will go to that
13 room in the back of the courtroom and leave your clothes, if
14 we're not yet summer, because this morning was like summer.
15 And those who come by 9:30 will get muffins and coffee there.
16 And you will return there to refresh yourselves during the
17 course of the day. And in the meantime you will give
18 Mr. Daniels your address and telephone number so that he can
19 keep in touch in the event that we need to.

20 But I just now want to tell you a few things that you
21 should know in connection with the trial.

22 I'd like to give you a little background on what will
23 happen during the trial. At the end of the trial, I will give
24 you more detailed guidance on how you ought to go about
25 reaching your verdict. But now I simply want to explain how

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Preliminary Instructions

1 the trial will proceed.

2 This is a criminal case, as we all know. The
3 defendant has been charged with the commission of federal
4 crimes in an indictment filed by a grand jury sitting in this
5 district. The indictment is simply a description of the
6 charges made by the government against the defendant; it is not
7 evidence of anything. The defendant has pleaded not guilty to
8 the charges, and denies committing the offenses charged. The
9 defendant is presumed to be innocent, and you may not find him
10 guilty unless all of you unanimously find that the government
11 has proved his guilt beyond a reasonable doubt.

12 The first step in the trial will be an opening
13 statement by the government. The government goes first because
14 it has the burden of proof, as I've explained. In its opening
15 statement, the government will tell you about the evidence
16 which it intends to put before you. But just as the indictment
17 is not evidence, neither is the opening statement evidence.
18 Its purpose is only to help you understand what the evidence
19 will be and what the government will try to prove. The lawyers
20 are not witnesses. Witnesses are people with firsthand
21 knowledge of what happened, and they will testify under oath.
22 The lawyers are not witnesses.

23 After the government's opening statement, the
24 defendant's lawyer may make an opening statement, but he is not
25 required to do so.

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1 The government will then offer evidence that it says
2 will support the charges against the defendant. The
3 government's evidence will consist of the testimony of
4 witnesses, as well as documents and exhibits.

5 Some of you have probably heard the terms
6 "circumstantial evidence" and "direct evidence." Do not be
7 concerned with these terms. You hear it too much on
8 television, but that's not the law of the United States. You
9 are to consider all the evidence received during the trial.

10 After the government's evidence is presented, the
11 defendant's lawyer may present evidence on the defendant's
12 behalf, but he is not required to do so. I remind you that the
13 defendant is presumed to be innocent, and that the government
14 must prove the guilt of the defendant beyond a reasonable
15 doubt. The defendant does not have to prove his innocence.

16 After you have heard all the evidence, the government
17 and the defendant will each be given time for their final
18 arguments. I just told you that the opening statements by the
19 lawyers are not evidence. The same applies to the closing
20 statements. The closing arguments, they are not evidence
21 either.

22 In their closing arguments, the lawyers, both for the
23 government and the defendant, will attempt to summarize their
24 cases and help you to understand the evidence that was
25 presented. But the lawyers are not witnesses; they have no

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1 personal knowledge of the facts.

2 The final part of the trial occurs when I instruct you
3 about the rules of law that you are to use in reaching your
4 verdict. After hearing my instructions, you will leave the
5 courtroom together to make your decision. Your deliberations
6 will be secret. Nobody will know what your discussions are
7 outside of the jury room.

8 During the course of the trial -- right. And your
9 deliberations will be secret.

10 During the course of the trial, you should not talk
11 with any witness or with the defendant or with any of the
12 lawyers in the case. Please do not talk with them about any
13 subject at all. In addition, during the course of the trial,
14 you should not talk about the trial with anyone else: Not your
15 family, not your friends, not the people you work with. Also,
16 you should not even discuss the case among yourselves until you
17 have heard all of the evidence, and I have instructed you on
18 the law, and you have gone to the jury room to make your
19 decision at the end of the trial. It's important that you wait
20 until all the evidence is received and you have heard my
21 instructions on the rules of law before you deliberate even
22 among yourselves. Evidence comes in bit-by-bit and
23 piece-by-piece, and it's not until you've heard it all that you
24 are ready to deliberate.

25 Please do not permit any third person to discuss the

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1 case in your presence. And if anyone does so, despite your
2 telling that person not to, please report that fact to me as
3 soon as you are able. You should not, however, discuss with
4 your fellow jurors either that fact or any other fact that you
5 feel is necessary to bring to my attention.

6 Let me add that during the course of the trial, you
7 will receive all the evidence you properly may consider to
8 decide the case. Because of this, you should not attempt to
9 gather any information on your own which you think might be
10 helpful. Do not engage in any outside reading on this case; do
11 not attempt to visit any places mentioned in the case; and do
12 not in any other way try to learn about the case outside the
13 courtroom. The reason for these rules, as I'm certain you
14 understand, is that your decision must be made solely on the
15 evidence presented at the trial in this courtroom.

16 At times during the trial, a lawyer may make an
17 objection to a question asked by another lawyer or to an answer
18 by a witness. This simply means that the lawyer is requesting
19 that I make a decision on a particular rule of law. Do not
20 draw any conclusion from such objections or from my rulings on
21 the objections. These only relate to the legal questions that
22 I must determine and should not influence your thinking.

23 If I sustain an objection to a question, the witness
24 may not answer it. But do not attempt to guess what the answer
25 might have been had I allowed the question to be answered.

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1 Similarly, if I tell you not to consider a particular
2 statement, you should put that statement out of your mind, and
3 you may not refer to that statement in your later
4 deliberations.

5 During the course of the trial, I may ask a question
6 of a witness. If I do so, that does not indicate that I have
7 any opinion about the facts in the case.

8 Finally, let me clarify something you may wonder about
9 later.

10 During the course of the trial, I may have to
11 interrupt the proceedings to confer with the attorneys about
12 the rules of law which should apply. Sometimes we will talk
13 here at the sidebar, side of the bench, but some of these
14 conferences may take time. So as a convenience to you, I may
15 excuse you from the courtroom. I will try to avoid such
16 interruptions as much as possible, but please be patient, even
17 if the trial seems to be moving slowly, because conferences
18 often save time for all of us.

19 Thank you all for your attention. And I will see you
20 all tomorrow morning. And if it is at 9:30, you will receive
21 coffee and muffins. But everybody must be in the courtroom by
22 10 o'clock.

23 Have a pleasant evening. And resist telling anybody
24 about what you've seen and heard.

25 (Jury excused)

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1 THE COURT: Unless there's anything further, we will
2 be in recess until tomorrow morning at 10 o'clock.

3 MR. SKINNER: Nothing, your Honor. Thank you.

4 MS. BURNS: Thank you.

5 MR. COHEN: Thank you, your Honor.

6 Have a good evening.

7 THE COURT: You're all excused.

8 (Adjourned to April 10, 2013 at 10 o'clock a.m.)
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